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Nos. 85-954 and 85-955

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

MALCOLM BALDRIGE, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In our opening brief, we explained that the court of appeals erred in holding that the Secretary of Commerce has a nondiscretionary duty to certify that Japan's temporary and limited whaling in excess of international quotas—conditioned upon complete termination of its commercial whaling activities—has "diminished the effectiveness" of the International Convention for the Regulation of Whaling (ICRW). We demonstrated that the plain language of the Pelly Amendment, 22 U.S.C. 1978(a), and the Packwood Amendment, 16 U.S.C. 1821(e)(2), vests the Secretary with discretion in de-

termining whether a departure from International Whaling Commission (IWC) quotas "diminishes the effectiveness" of the ICRW (Fed. Br. 16-21). We also showed that the legislative history supports this interpretation (*id.* at 22-41) and that, even if the plain language and legislative history were open to debate, this Court should defer to the Secretary's reasonable interpretation of the statutes (*id.* at 41-46). Finally, we explained that relief in the form of mandamus was wholly inappropriate in this case (*id.* at 46-50).

Respondents have failed to refute our position; furthermore they have failed to address the fundamental weakness of their own. They defend the court of appeals' conclusion that "where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary" (Pet. App. 42a). Yet they do not identify a single statement in the statutes or their legislative history that expressly imposes this requirement. And they do not explain why, if Congress had intended mandatory certification, it then couched the certification standard in discretionary terms. Respondents cite authorities ranging from *Moby Dick* to *Marine Mammal News*, but they offer no persuasive support for their construction of the statutes.[1]

1. We note, at the outset, that respondents' "counterstatement of the case" (Resp. Br. 1-10) lacks a measure of objectivity. Their description of the relevant legisla-

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[1] Congressional amici have filed a brief raising the "political question doctrine" and whether, "[w]here a congressional enactment may have some impact on international relations, is it improper for a court to consider a statute's legislative history in determining Congressional intent" (Amicus Br. I). Amici expressly state, however, that they "do not address the proper reading of the statute" (*id.* at 3). Thus, they take no position on the central issue in this case. As our opening brief makes clear, the "political question" issues raised in Judge Oberdorfer's dissent need not be reached (Fed. Br. 47 n.56). Furthermore, there is no dispute that legislative history is relevant to statutory interpretation (see Fed. Br. 22-41). Thus, there is no need to discuss the questions that amici pose.

tion is inaccurate in several significant aspects.[2] And their description of Japan's whaling activities overlooks a number of salient facts.[3] But most troubling, respondents simply gloss over the extreme character of their position. Respondents demand automatic imposition of severe economic sanctions against a foreign ally—historically and culturally committed to whaling—that has agreed to join in the IWC moratorium. They ask this Court to nullify an international agreement with Japan that, in the informed judgment and expert opinion of the Secretary of Commerce (and the Secretary of State), advances the ultimate cause of whale conservation.[4]

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[2] For example, respondents state that the Pelly Amendment was enacted "in reaction to the devastation of the great whales" (Resp. Br. 4). However, the legislative history makes clear that the statute responded primarily to Denmark's over-exploitation of Atlantic salmon. See Fed. Br. 24-27. Respondents also state that Congress, in enacting the Pelly Amendment, "explicitly rejected the methods of bilateral diplomacy, with their traditional tradeoffs and compromises" (Resp. Br. 4). However, the legislative history indicates that Congress expected that negotiations would continue to play an important role. See Fed. Br. 27-28 nn.33 & 34. Indeed, the Danish salmon crisis, which precipitated the legislation, was resolved through negotiated settlement. See Fed. Br. 29-30 n.36. Respondents further state that "the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified" (Resp. Br. 5). Again, this is inaccurate. See note 15, *infra*.

[3] For example, respondents note that Japan cast "the only vote in opposition" to sperm whale harvests from the Western Division Stock (Resp. Br. 8) but neglect to mention that Japan was the only nation that harvested whales from that Stock (Fed. Br. 5). And they imply (Resp. Br. 10) that when "Japan continued to take sperm whales in the 1982-83 and 1983-84 seasons" it did so under formal objection; in fact, the IWC expressly permitted these takings (Fed. Br. 5-6). They also state that Japan is conducting whaling operations in "palpable violation" of IWC decisions (Resp. Br. 11), but neglect to mention that the ICRW expressly permits whaling nations to object to IWC quotas and thereby exempt themselves from the IWC taking prohibitions (Fed. Br. 4).

[4] Japan, by submitting to the IWC moratorium, must terminate all commercial whaling activities unless and until the IWC itself

At bottom, respondents seem to object to *any* taking of whales, irrespective of IWC judgment. For example, they criticize (Resp. Br. 11 n.23) the Secretary's reliance on the IWC Scientific Committee's conclusion that Japan's limited whaling "would have only a small effect on the stock in the short term" (Fed. Br. Addendum II) and that the long-term effects are open to scientific debate (*ibid.*). Furthermore, they castigate Japan for participating *within the ICRW framework* on the IWC's reevaluation of the moratorium and a redefinition of subsistence whaling (Resp. Br. 11-12). In sum, respondents seem to be philosophically opposed to any accommodation with whaling nations.

2. Respondents contend that the Executive's duty to obey the law, the plain language and legislative history of the statutes, and past agency practices support their position. None of these arguments is persuasive.

a. Respondents first contend that "the Executive Branch is not above the law just because its action affects foreign affairs" (Resp. Br. 13). But the government has never suggested that it can deviate from its constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. We do not "think Congress erred" (Resp. Br. 15); instead, we submit that the courts below gave a mistaken interpretation to the relevant statutes (Fed. Br. 15-41). We urge, in accordance with this Court's decisions, that the judiciary should respect reasonable Executive Branch interpreta-

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allows further whaling. Respondents are well aware that the non-whaling nations now dominate the IWC and, accordingly, the moratorium decision is unlikely to be reversed. Indeed, the adoption of the moratorium is largely attributable to the success of non-whaling nations in recruiting new signatories that have joined the non-whaling camp. See *Review of the 33d International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 13-14 (1981). Thus, respondents are simply "crying wolf" in contending (Resp. Br. 11) that Japan's commercial whaling industry will continue.

tions of statutes affecting foreign affairs (*id.* at 42-46) and that the courts below erred in exercising their mandamus powers in light of the foreign relations consequences of this dispute (*id.* at 48-50).[5]

b. Respondents next address the "plain language" of the Pelly and Packwood Amendments (Resp. Br. 16-17). They agree that these statutes instruct the Secretary of Commerce to certify foreign nations when he "determines that nationals of a foreign country * * * are conducting fishing operations in a manner or under circumstances which diminish the effectiveness" of the ICRW. 22 U.S.C. 1978(a); see 16 U.S.C. 1821(e)(2). But they assert that "knowing contravention of the IWC moratoria necessarily and by definition 'diminished the effectiveness' of the IWC and the Convention" (Resp. Br. 16). They make little effort to defend this statement, claiming that "[t]here is hardly much room for rational argument to the contrary" (*ibid.*). Their contention that this language creates a nondiscretionary duty to certify—enforceable by mandamus—is mistaken at a number of different levels.

First, respondents completely ignore that the Pelly and Packwood Amendments, by their plain terms, place the decision to certify within the informed judgment of the Secretary of Commerce. As we observed in our opening brief (Fed. Br. 19), statutory language "requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary." *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515-516 (1840). Thus, the plain language refutes respondents' contention that the statute im-

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[5] Respondents, by contrast, seem to think (Resp. Br. 14) that *this Court* has erred in stating that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).

poses a mandatory, nondiscretionary duty to certify, enforceable by mandamus.[6]

Indeed, the Pelly and Packwood Amendments *nowhere* state that the Secretary *must* certify every departure from IWC harvest quotas. Respondents' "plain language" argument rests wholly on their erroneous contention that all quota violations—regardless of magnitude and surrounding circumstances—"necessarily and by definition" (Resp. Br. 16) diminish the effectiveness of the ICRW. Respondents thus do not rely on "plain language" at all; they are simply drawing broad—and unjustified—inferences from the statutory terms.

As we note in our opening brief (Fed. Br. 4, 20 n.23), the ICRW does not require that a member country comply with IWC harvest quotas provided that the country files a timely objection. Thus, there is no merit to respondents' argument that any nation that files objections and take whales in excess of IWC quotas "necessarily and by definition" (Resp. Br. 16) diminishes the effectiveness of the ICRW. The Secretary *may* determine that whaling pursuant to a formal objection has that effect, but there is no requirement that he must reach that conclusion. Instead, the Secretary is charged with exercising informed judgment in light of the facts presented by each case. See Fed. Br. 20 n.23. In this instance, the Secretary reasonably concluded that Japan's limited short-term whaling, coupled with an agreement to withdraw its objection to the IWC sperm whale quotas and commercial whaling moratorium, did not warrant certification (see Fed. Br. 42-46).[7]

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[6] Cf. *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976) ("'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow hidden sense * * *'") (quoting *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)).

[7] Respondents' remaining contentions concerning the plain language are insubstantial. They state that the government is "hard put to suggest" that Japan's whaling "enhances the prestige or strengthens the authority or adds to the reputation and weight

c. Respondents submit that their position finds support in the legislative history of the Pelly and Packwood Amendments. We disagree. Respondents rely on doubtful inferences drawn from ambiguous statements in the floor debates and congressional hearings (Resp. Br. 18-21, 24-29). The deficiencies in respondents' arguments are fully discussed in our opening brief (Fed. Br. 24-29, 33-39). As we stated (*id.* at 28, 35), the legislative history nowhere contains an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Respondents' attempt to dispute that statement validates our conclusion.

Respondents find their "express authoritative statement" (Resp. Br. 25) in the 1979 House hearings addressing whaling oversight.[8] They claim that "Congress

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of either the IWC or the Convention" (Resp. Br. 16). Those, of course, are not the statutory criteria. Respondents state (*ibid.*) that the Secretary should not be permitted to "weigh any consideration whatever" in making a certification decision. That argument mischaracterizes both the government's position and the facts of this case. As we submit in our opening brief, the "diminish the effectiveness" standard "invests the Secretary with broad discretion to apply his expertise and evaluate all pertinent factors in each particular case" (Fed. Br. 19). The Secretary plainly considered wholly proper factors in reaching his decision in this case (see Fed. Br. Addendum III 5a-7a). Respondents further contend (Resp. Br. 17) that the failure to certify Japan displaces the Packwood Amendment's "remedial period" provisions. However, those provisions come into play only *after* the Secretary has determined that foreign nationals are diminishing the effectiveness of the ICRW. See note 11, *infra*. Congress can quite reasonably conclude that the Secretary shall have broad discretion in determining whether whaling activities diminish the effectiveness of the ICRW, while further concluding that once he certifies pursuant to the applicable standard, the foreign nation shall have a grace period prior to the imposition of permanent mandatory sanctions.

[8] *Fish and Wildlife Miscellaneous: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. Pt. 1 (1979) [hereinafter cited as the *June 4, 1979 House Hearings*].

sought and obtained from the Department of Commerce witness agreement that certification is mandatory and nondiscretionary with respect to intentional contravention of IWC quotas" (*ibid.*). Their interpretation of the colloquy is mistaken. Moreover, even if it were accurate, respondents fail to explain how a witness's conjecture can control the meaning of a previously enacted statute.

Respondents place their reliance on a statement from Richard Frank, Administrator of the National Oceanic and Atmospheric Administration, expressing agreement with Rep. Breaux's suggestion that "if a country is *violating the terms of an international treaty*, the Secretary * * * has to certify that he is doing that, and that is not a discretionary thing."[9] Obviously, Mr. Frank simply agreed that *treaty violations*—not departures from IWC harvest quotas—would result in certification. As we have previously discussed (page 6, *supra*; see Fed. Br. 4, 20 n.23), the relevant treaty—the ICRW—does not require compliance with IWC harvest quotas, provided that timely objections are filed.[10]

The Frank-Breaux colloquy plainly falls far short of an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Moreover, Mr. Frank's interpretation of the Pelly Amendment, offered in response to impromptu questions during a congressional hearing, can-

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[9] Resp. Br. 26 (emphasis partially deleted (quoting *June 4, 1979 House Hearings* 323)).

[10] Respondents also cite Mr. Frank's statement that "'[i]f a country were violating something in the schedule, for example, taking more whales than the schedule provides, *and that were a significant violation*, I believe it is clear that the Pelly amendment would apply'" (Resp. Br. 27 (emphasis partially deleted (quoting *June 4, 1979 House Hearings* 312)). However, this statement supports the government's position. Mr. Frank's express reference to *significant violations* demonstrated his understanding that the "diminish the effectiveness" determination necessarily required the exercise of discretion, a view that Rep. Breaux shared. See Fed. Br. 37 n.46.

not control the meaning of that statute, which was enacted eight years earlier, or the Packwood Amendment, which simply adopted the Pelly Amendment's certification standard (see Fed. Br. 34-35). Plainly, respondents cannot credibly suggest that this testimony—their most powerful support, culled from hundreds of pages of legislative history—establishes that the Secretary has a mandatory duty to certify departures from IWC harvest quotas. Cf. *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 14; *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972).[11]

Respondents challenge (Resp. Br. 31) the relevance of other international conservation statutes, cited by the government, that impart Executive Branch discretion through the use of the "diminish the effectiveness" stand-

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[11] See Recent Development, *International Conservation—United States Enforcement of World Whaling*, 26 Va. J. Int'l L. 513, 534 (1986) ("the complete legislative history of the phrase 'diminish the effectiveness' demonstrates congressional intent to provide the Secretary of Commerce with discretion in certifying a nation which exceeds international conservation programs"). Respondents continue to support their contention that certification of quota violations is mandatory by citing (Resp. Br. 20-21) legislative materials describing the post-certification steps in the sanctioning process. As we carefully explained in our opening brief (Fed. Br. 16-17), the certification and sanctioning process consists of three separate steps: (1) a determination—requiring the exercise of discretion—that foreign nations are conducting whaling operations in a manner that "diminishes the effectiveness" of the ICRW; (2) a certification, which is mandatory if an affirmative determination is made; and (3) the imposition of sanctions, which is discretionary under the Pelly Amendment and mandatory under the Packwood Amendment. It requires no "linguistic miracle" (Resp. Br. 21)—only attentiveness to language and syntax—to recognize that the mandatory language of the statutes applies to the second and third steps of the process. Respondents' argument (Resp. Br. 29-31) that the Packwood Amendment removed all discretion from the certification process founders on the same point. The Packwood Amendment left the "diminish the effectiveness" determination untouched (see Fed. Br. 34-35); it only curtailed sanctioning discretion (see *id.* at 37 n.46).

ard. These statutes are obviously relevant insofar as they demonstrate that the "diminish the effectiveness" standard has an established and generally understood meaning. Plainly, it would be anomalous if that standard imposed mandatory, non-discretionary duties on the Secretary in the case of whale conservation programs, but conferred discretion in the case of tuna and endangered species programs. Cf. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983).

Respondents also contend (Resp. Br. 31) that two of these statutes can be read to support their position. Their reliance on the Eastern Pacific Tuna Licensing Act of 1984 (EPTLA), 16 U.S.C. (Supp. II) 972 *et seq.*, is misplaced. As we explain in our opening brief (Fed. Br. 39-40), the EPTLA implements the Eastern Pacific Ocean Tuna Fishing Agreement (EPOTFA), which requires international licensing of tuna boats and provides for "conservation measures under specified circumstances." S. Exec. Rep. 98-13, 98th Cong., 1st Sess. 1 (1983). The EPTLA prohibits the Secretary of State from compensating tuna fishermen whose boats are seized by foreign governments pursuant to the EPOTFA unless the tuna boat's infractions are "not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. (Supp. II) 972c. The House report specifically observes that the application of this standard to conservation regulations requires the exercise of discretion.[12]

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[12] The House report states "the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the EPOTFA, *the seriousness of a violation of a conservation regulation would need to be determined by the Secretary*." H.R. Rep. 98-721, 98th Cong., 2d Sess. 5 (1984) (emphasis added). Respondents contend (Resp. Br. 33) that the House Committee viewed licensing violations as more serious than quota departures because licensing was the "primary purpose" of the EPOTFA; they then suggest that IWC quotas are the primary purpose of the ICRW. This inference is

Respondents also contend—mistakenly—that the 1962 Amendments to the Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, support their position. They argue that this legislation, which also employs a "diminish the effectiveness" standard, requires nondiscretionary imposition of sanctions in response to violation of conservation regulations. Respondents draw this inference (Resp. Br. 34-35) from the Executive Branch's general statement of objectives (S. Rep. 1737, 87th Cong., 2d Sess. 7 (1962)). They completely ignore the Executive's accompanying explanation of its plans for implementation (*id.* at 7-8) and the subsequently enacted regulations (50 C.F.R. 281.5), which plainly contemplate the exercise of discretion. See Fed. Br. 22-24.[13]

Respondents make no claim that the 1978 Amendment to the Pelly Amendment supports their position; they

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doubtful. The Committee presumably gave special note to licensing infractions because they directly violate the EPOTFA itself (Fed. Br. 40 n.47). Furthermore, harvest quotas are not the "primary purpose" of the ICRW. The ICRW, in regulating whaling practices, does not specifically require harvest quotas (see Fed. Br. 4). Instead, conservation regulations, under *both* the EPOTFA and the ICRW, are promulgated through subsequent agreement by implementing commissions (Fed. Br. 40 n.47). In all events, the House report demonstrates that congressional committees know how to offer specific direction to the Executive Branch's exercise of discretion. As previously explained, the legislative history of the Pelly and Packwood Amendments contains no similar statements guiding the Secretary's exercise of discretion.

[13] Respondents claim (Resp. Br. 35) that "[i]mplementation of the 1962 Amendments * * * confirms the mandatory nature" of these provisions. The example they cite—the 1975 embargo of Spain's yellowfin tuna exports—confirms the opposite conclusion. The Notice of Embargo specifically states that the embargo was based on consideration of the factors set forth in 50 C.F.R. Pt. 281. See 40 Fed. Reg. 48159 (1975). It further states that Spain's fishing activities "are contrary to the conservation recommendations of the [Commission] *and* tend to diminish the effectiveness of the IATTC conservation recommendations * * *." *Id.* at 48160 (emphasis added). Thus, the embargo was not imposed solely on the basis of departures from the recommendations.

apparently concede that application of the "diminish the effectiveness" standard in that legislation requires the exercise of discretion.[14] Instead, respondents contend (Resp. Br. 36) that this legislation "is not an analogue" to the legislation at issue in this case. Plainly, they are wrong. The 1978 Amendment provides sanctions where foreign nationals "are engaging in trade or taking which diminishes the effectiveness of any international program for endangered species." 22 U.S.C. 1978(a)(2). It is based upon, codified within, and mirrors precisely the pre-existing Pelly Amendment certification provisions at issue in this case. See Fed. Br. 30-31. Respondents mistakenly argue (Resp. Br. 36) that the 1978 Amendment "sheds no light" on the certification standard, asserting that the legislation "was intended to support the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) [*opened for signature*, Mar. 3, 1973, 27 U.S.T. 1087]," which deals with endangered species trade. However, the legislation, by its express terms, has general applicability to both trade *and* taking; it applies to "any international program for endangered species." 22 U.S.C. 1978(a)(2). Cf. *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 10. Indeed, the House report states (H.R. Rep. 95-1029, 95th Cong., 2d Sess. 8-11 (1978) (emphasis added)):

> The nature of *any trade or taking* which qualifies as diminishing the effectiveness of *any international program for endangered or threatened species* will depend on the circumstances of each case.

See also Fed. Br. 31-32. Thus, the 1978 Amendment, in form and function, is directly analogous to the original Pelly Amendment.

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[14] Indeed, that conclusion is inescapable. The House Committee specifically directed the Secretary to exercise discretion in determining whether given actions "diminish the effectiveness" of the affected conservation programs. See Fed. Br. 30-33.

d. Respondents further contend (Resp. Br. 37-39) that the Secretary has consistently treated departures from harvest quotas as mandatory grounds for certification. They neglect to mention that the court of appeals rejected that contention, stating that "the record does not conclusively show what that practice has been" and that the matter "does not present a genuine issue of material fact" (Pet. App. 32a n.19).

Respondents are mistaken in asserting (Resp. Br. 5) that "as far as the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified." [15] The record shows that, while the United States has maintained that departures from harvesting quotas will generally result in certification, certification decisions are approached on a case-by-case basis.[16] In all events, a consistent record

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[15] Administration testimony in 1976 House Hearings revealed that, in 1974, American observers discovered 6 minor violations of IWC taking prohibitions involving the harvesting of undersized and nursing female whales. The Administration witness described these as "technical violations as opposed to a blatant, wilful taking of whales in an illegal way." *Marine Mammal Amendments: Hearings on H.J. Res. 923, H.R. 12460, H.R. 12646, et al. Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 21 (1976). In addition, the record in this case discloses numerous instances in which the Secretary declined to certify departures from IWC imposed requirements (J.A. 114-120 (Affidavit of Dean Swanson, Special Assistant to United States IWC Commissioner)). For example, the United States agreed in 1983 to withhold certification of Chile's limited whaling in excess of IWC quotas in exchange for Chile's agreement to comply with the IWC whaling moratorium (*id.* at 118).

[16] Indeed, the materials that respondents cite demonstrate this fact. For example, respondents quote President Ford's statement that departures from IWC harvest quotas present a "'prima facie'"—rather than a *conclusive*—case for application of the Pelly Amendment. Resp. Br. 5 (quoting White House Press Release, Jan. 16, 1975 (J.A. 175)). And respondents quote the Secretary's statement certifying Chile, Peru and Korea "based on the fact that those countries are not members of the IWC and their

of certification would not demonstrate that certification is mandatory; that record would equally demonstrate that the Secretary determined that the particular circumstances in each of those instances warranted certification. Thus, respondents' reliance on the government's past certification record adds nothing to their position that certification is *always* required.[17]

e. Respondents offer this Court no guidance in the event that it finds the Pelly and Packwood Amendments ambiguous. As we explained in our opening brief (Fed. Br. 41-42), if this Court finds congressional intent uncertain, the Secretary's reasonable construction should control. Respondents do not (and, indeed, cannot) dispute that the Secretary's construction of the Pelly and

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nationals harvest whales *substantially* in excess of IWC quotas * * *." Resp. Br. 23 (quoting Letter from the Secretary of Commerce to the President, Dec. 14, 1978 (J.A. 177) (emphasis added)). Plainly, there would be no need to consider the circumstances and seriousness of the quota departure if—as respondents insist—certification of all quota departures is mandatory. Respondents rely heavily (Resp. Br. 38-39) on Secretary Baldrige's 1984 letter to Senator Packwood concerning application of the Pelly and Packwood Amendments (J.A. 198). That letter simply recognizes a general policy toward nations that "choose[] to ignore" (*ibid.*) the IWC whaling moratorium. It does not (and could not) estop the Secretary from declining to certify a nation that agrees to comply—after a short delay—with the IWC decision and thereby guarantee achievement of the IWC's objectives.

[17] Respondents also attempt to find support in *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978), a suit brought by Alaskan Natives to compel the United States to file an objection to IWC limitations on aboriginal whaling. Respondents note that the government officials, in resisting that suit, stated that "a United States objection could result in the breakdown of [the] IWC" (Resp. Br. 37-38 (quoting Aron Affidavit (J.A. 153-154)). The situation in *Adams* is plainly distinguishable—the United States has not filed an objection to IWC quotas in the present case; it is exercising discretion in not imposing its *own* economic sanctions. Furthermore, *Adams* supports our position that the United States must exercise informed judgment and balance competing interests when formulating international conservation policies.

Packwood Amendments would qualify as a reasonable interpretation of ambiguous statutory language (*id.* at 42-46). The Secretary quite sensibly interprets those statutes to permit consideration of all relevant factors in making a certification decision.[18]

3. Respondents argue that the court of appeals correctly affirmed the district court's mandamus order requiring the Secretary to certify Japan. As we noted in our opening brief (Fed. Br. 46), mandamus relief under 28 U.S.C. 1361 is plainly inappropriate because the Secretary does not owe respondents "a clear nondiscretionary duty" (*Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984)) and because institutional and equitable considerations weigh against the exercise of an extraordinary remedy.[19]

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[18] We note that the Secretary's interpretation is consistent with recent scholarly literature concerning effective imposition of international economic sanctions. See G. Hufbauer & J. Schott, *Economic Sanctions Reconsidered: History and Current Policy* (1985). These commentators examine 103 cases of attempted imposition of international economic sanctions and conclude that "sanctions occasionally bear fruit, but only when planted in the right soil and nurtured in the proper way" (*id.* at 81). They note that a government "should think through its means and objectives *before* taking a final decision to deploy sanctions" (*id.* at 91 (emphasis in original)).

[19] Respondents seemingly agree that, if the court of appeals erred in concluding that "certification is mandatory and nondiscretionary" (Pet. App. 42a) they are entitled to no relief. They contend, however (Resp. Br. 42 n.35), that "[e]ven apart from the mandamus statute itself, a mandatory injunction to compel [a] nondiscretionary duty is authorized" under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* The courts below implicitly rejected that theory, basing relief on 28 U.S.C. 1361 and stating that "no other adequate remedy exists" (Pet. App. 42a; see *id.* at 83a). See, *e.g.*, *Nova Stylings, Inc.* v. *Ladd*, 695 F.2d 1179 (9th Cir. 1983) (mandamus unavailable where APA provides relief). Cf. *Heckler* v. *Ringer*, 466 U.S. at 616 (mandamus available only where the plaintiff "has exhausted all other avenues of relief"). The APA does not, of course, confer jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99 (1977). And plaintiffs seeking APA relief in the nature of mandamus must still demonstrate that they are owed a duty, viola-

a. Respondents contend—quite remarkably—that they are entitled to mandamus relief even though the government owes them no specific duty to certify Japan. They assert (Resp. Br. 41 (footnote omitted)):

> Mandamus has long been available to "any person" who sustains injury when an Executive Officer refuses to perform a nondiscretionary duty. *Garfield* v. *Goldsby*, 211 U.S. 249, 261 (1908) (quoting *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1875)). And no case holds that the type of injury required to invoke mandamus differs from the type of injury required to provide standing to sue in the first place.

In short, respondents argue that 28 U.S.C. 1361 authorizes anyone who can meet minimal standing requirements to bring a mandamus action against the government. Plainly, this is not the law.

Respondents completely ignore the plain language of the mandamus statute, which confers mandamus jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a *duty owed to the plaintiff*." 28 U.S.C. 1361 (emphasis added). This language could hardly be more explicit: Section 1361 does

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tion of which would constitute a "legal wrong." 5 U.S.C. 702. Furthermore, APA relief is circumscribed by provisions preserving equitable limitations on remedies (*ibid.*), and withholding "authority to grant relief if any other statute that grants consent to suit [such as 28 U.S.C. 1361] expressly or impliedly forbids the relief which is sought" (5 U.S.C. 702(2)). Thus, the APA, even if applicable, would not relax the standards for the relief respondents seek. See 5 U.S.C. 703.

Notably, respondents do not contend that the Secretary's decision against certification constitutes an "abuse of discretion" within the meaning of the APA. See 5 U.S.C. 706(2)(A). Indeed, there is serious doubt whether the Secretary's exercise of discretion would be subject to APA review. See 5 U.S.C. 701(A)(2). See, *e.g.*, *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); *Johnson Oyster Co.* v. *Baldridge* [*sic*], 704 F.2d 1060 (9th Cir. 1983). In all events, the record in this case demonstrates that the Secretary properly exercised his discretion.

not provide a remedy for one who merely claims injury, sufficient to confer standing, from government inaction.[20]

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[20] Respondents confuse the concepts of jurisdiction, a cause of action, and standing. See *Davis* v. *Passman*, 442 U.S. 228, 239-240 n.18 (1979). Section 1361 confers jurisdiction over cases in which the government, as a matter of law, owes a nondiscretionary duty to the plaintiff. Respondents, therefore, must first establish their cause of action by identifying the federal right—and consequent government duty—that entitles them to mandamus relief. See *ibid.* An allegation that the government has failed to adhere to statutory requirements, even if coupled with a claim of injury, is insufficient to establish a mandamus cause of action. Instead, respondents must identify a "duty owed" specifically to them. 28 U.S.C. 1361. See generally *Davis*, 442 U.S. at 240 n.18. Furthermore, a cause of action is distinct from the concept of standing, which turns on whether respondents themselves can assert sufficiently discrete injury and prospects for redress to create a case or controversy. See *ibid.*

Respondents have raised the question of their standing (Resp. Br. 41, 42 n.35); we therefore offer a brief response. The issue of standing need not be reached; since respondents are not entitled to relief under the mandamus statute, "questions of standing * * * become immaterial." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974). See *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 353 n.4 (1984); *Norton* v. *Mathews*, 427 U.S. 524, 532 (1976). Should this Court disagree, we do acknowledge that respondents' standing is open to question in light of this Court's recent decisions. See, *e.g.*, *Allen* v. *Wright*, No. 81-757 (July 3, 1984). Even if it is assumed that respondents have a sufficiently discrete interest in "long-term effects" (Resp. Br. 11 n.23) on free-roaming whales inhabiting international waters to allege "personal injury fairly traceable to" (*Allen*, slip op. 12-13) the Secretary's decision against certification of Japan, they cannot realistically contend that their alleged injury is "likely to be redressed by the requested relief" (*ibid.*). Respondents' contention that certification of Japan will lead to a halt in Japanese whaling is "pure speculation" (*id.* at 20). See Fed. Br. 42-45, 49. The Soviet Union has been certified (*id.* at 7 n.13) but continues to conduct whaling activities. And a recent empirical study concludes that "[i]n most cases, sanctions do not contribute very much to the achievement of foreign policy goals." G. Hufbauer & J. Schott, *supra* note 18, at 79. See also Recent Development, *supra* note 11, 26 Va. J. Int'l L. at 542-544. Thus, respondents'

Section 1361's legislative history confirms that a plaintiff seeking mandamus cannot premise his claim on mere injury sufficient to confer standing. The original bill authorized a remedy to compel a government agent "to perform his duty." See H.R. 1960, 87th Cong., 1st Sess. (1961); see 107 Cong. Rec. 12157 (1961). However, the Senate Committee amended this language, at the recommendation of the Justice Department, to make clear that "the bill is limited to compelling a Government official or agency to perform a duty owed to the plaintiff * * *." S. Rep. 1992, 87th Cong., 2d Sess. 1-2 (1962).[21] The Senate report specifically states that the bill "does not create new liabilities or new causes of action against the U.S. Government" (*id.* at 2).

Finally, the case law refutes respondents' argument that mandamus is available upon a showing of injury sufficient to confer standing. The courts, in accordance with Section 1361's express terms, consider the availability of mandamus in light of whether a *duty* is owed to the plaintiff.[22]

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standing appears dubious. Compare, *e.g.*, *Allen*, slip op. 20-21; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).

[21] The House concurred in this amendment. See 108 Cong. Rec. 20093 (1962) (Rep. Forrester) ("The Senate amended the House bill to spell out in greater detail the nature of the jurisdiction conferred. The Senate amendment makes it clear that the duty must be one owed to the plaintiff.").

[22] See, *e.g.*, *Heckler* v. *Ringer*, 466 U.S. at 616 (mandamus available "only if the defendant owes [the plaintiff] a clear nondiscretionary duty"). See generally 5 B. Mezines, J. Stein & J. Gruff, *Administrative Law* § 46.01 (1985). Contrary to respondents' suggestion (Resp. Br. 41), the courts do not afford mandamus relief to plaintiffs who, while perhaps able to demonstrate injury from government inaction, cannot show that the government owes them a specific duty. See, *e.g.*, *Tagupa* v. *East-West Center, Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981) (compliance with civil rights regulations); *Rush* v. *Parham*, 625 F.2d 1150, 1154 n.5 (5th Cir. 1980) (disapproval of state Medicaid plan); *Kirkland Masonry, Inc.* v.

b. Respondents contend (Resp. Br. 39-43) that this Court should give no allowance to institutional and equitable principles when considering mandamus relief. Plainly, this Court can and should take such factors into account. See Fed. Br. 47-48; see also, *e.g.*, *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 360-361 (1933). Furthermore, the factors that we have cited—in particular, the foreign relations implications of ordering certification—are plainly appropriate considerations in determining whether to order equitable relief. See *Allen* v. *Wright*, slip op. 22-23.

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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Commissioner, 614 F.2d 532, 534 (5th Cir. 1980) (disclosure of past tax audit information); *Davis Associates, Inc.* v. *Secretary of Housing & Urban Development*, 498 F.2d 385, 388 (1st Cir. 1974) (acceptance of construction bid). Indeed, even prior to the enactment of 28 U.S.C. 1361, the courts required a plaintiff to show he possessed a specific right that created a reciprocal government duty. See, *e.g.*, *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543 (1937) ("Where the right of the petitioner is not clear, and the duty of the officer * * * is not plainly defined and peremptory, mandamus is not an appropriate remedy."). The cases respondents cite (Resp. Br. 41) as contrary authority—*Garfield* and *McComb*—both involved plaintiffs who held specific rights that created reciprocal government duties. See *Garfield*, 211 U.S. at 262-263 (right to notice and hearing prior to extinguishing previously awarded property interests); *McComb*, 92 U.S. at 540 (contractual rights limiting state use of consolidation bonds). Although both cases refer to the plaintiff's "personal injury" (211 U.S. at 261; 92 U.S. 541), they use the term in the accepted sense of that era—as "a wrong which directly results in the violation of a legal right." *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479 (1938).

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